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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL ANDRADE, Defendant and Appellant.	G044076 (Super. Ct. No. 09HF1410) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John D. Conley, Judge. Affirmed.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ron Jakob and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Miguel Angel Andrade appeals from a judgment after a jury convicted him of numerous sexual offenses committed against his daughters. Andrade argues the trial court erred in refusing to instruct the jury on a lesser included offense and admitting evidence of child pornography recovered from his computer. Neither of his contentions have merit, and we affirm the judgment.

FACTS

Background

Andrade and his wife have two daughters, S.A. and M.A. In 2003, S.A. was 11 or 12 years old and M.A. was six or seven years old. In 2008, S.A. was 17 years old and M.A. was 12 years old. In the beginning of that year, Andrade's wife moved out of the apartment and in with another man.

S.A.

There were five incidents in 2003 when Andrade inappropriately touched S.A. S.A. was 11 or 12 years old and in sixth grade.

Count 7-S.A. was lying on her bed when Andrade massaged her back. Andrade touched S.A.'s breasts over her pajamas.

Count 8-Two or three weeks later, S.A. was in the living room watching television. Andrade sat next to her and touched her breasts over her clothes and then under her clothes. Andrade also touched her vagina under her clothing.

Count 9-On another occasion when Andrade touched S.A., he asked her to touch his penis. Andrade told S.A. "it was part of being a family." He grabbed her hand, put her hand on his penis, and moved her hand up and down until he ejaculated.

Count 10-S.A. was in the living room when Andrade touched her breasts and vagina under her clothing. On this occasion, Andrade touched S.A.'s clitoris.

Count 11-One time in the living room, Andrade was laying on top of S.A. S.A.'s shirt was off or pulled up and Andrade was kissing her chest. M.A. walked in and

Andrade told M.A. that he had fallen on top of S.A. M.A. believed her father and walked out.

Andrade showed S.A. pornographic movies and masturbated as they watched them. At some point when S.A. was 13 years old, she argued with Andrade about his collection of pornographic movies. After that argument, Andrade never touched her again. S.A. did not tell anyone about the molestations.

M.A.

There were six incidents in 2008 when Andrade inappropriately touched M.A. They occurred when M.A. was 11 years old, during her sixth grade year in school. Andrade had also shown M.A. pornographic movies.

Count 1-M.A. was in the living room lying on the couch watching television. Andrade came into the living room, kneeled next to M.A., and touched her breasts over her clothing.

Counts 2 and 3-A few days later, M.A. was in the living room sitting on the couch watching television when Andrade touched her breasts under her shirt but on top of her bra. He also rubbed her vagina. M.A. cried and asked Andrade to stop. Andrade told M.A. that "'families should love each other'" and "'we shouldn't be ashamed of our bodies.'" M.A. tried to get away, but Andrade grabbed her wrist and pulled her back.

Count 4-M.A. was asleep in her bed when Andrade rubbed her breasts over her shirt. He also rubbed her vagina under her pajama bottoms but over her underwear. M.A. cried and told him to stop. Andrade asked M.A. to touch his penis. Andrade grabbed her arm and when M.A. pulled away from him, Andrade said, "'it makes me happy and you shouldn't be afraid to love your own, your family.'"

Count 5-M.A. was on the couch when Andrade put his hand underneath her shorts and rubbed near her hips and buttocks.

Count 6-M.A. was in the living room on the couch when Andrade rubbed her chest and buttocks over her clothes. S.A. came home and opened the door.

S.A. asked M.A. if something was wrong. M.A. replied, "Yes." S.A. asked her if Andrade had touched her inappropriately, and M.A. responded, "Yes." S.A. yelled at Andrade and told him what he was doing was wrong. S.A. and M.A. left and went to S.A.'s friend's house. S.A. told her friend's mother what had happened, and the friend's mother reported it to M.A.'s school. The school's vice principal spoke with the girls. The police were called.

The Investigation

Officer Mike Manson searched and seized a pornographic movie, pornographic magazines, and a computer from Andrade's home. The pornographic movie had a scene in it that was consistent with a scene described by M.A.

Child Abuse Services Team (CAST) Interview

A few days later, Sharmin Skill interviewed M.A. M.A. said that on one of the occasions where Andrade touched her, he had been on the computer just prior. M.A. stated she saw Andrade looking at pornography on his computer.

Trial Proceedings

As relevant to this appeal, there were pretrial proceedings concerning the admissibility of child pornography retrieved from Andrade's computer. Briefly, the trial court ruled admissible 61 images of child pornography. The court later, however, ruled inadmissible 23 newly discovered images of child pornography based on timeliness. The court granted the prosecutor's motion to dismiss the case.

A refiled information charged Andrade with the following counts: (1) M.A.-four counts of committing a lewd act on a child under 14 years of age (Pen. Code, § 288, subd. (a))[1] (count 1-first touch of breasts; count 2-first touch of vagina; count 5-last touch of vagina & buttocks; & count 6), and two counts of forcible lewd act on a child under 14 years of age (§ 288, subd. (b)(1)) (count 3-second touch of

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

breasts & count 4-second touch of vagina); and (2) S.A.-four counts of committing a lewd act on a child under 14 years of age (§ 288, subd. (a)) (count 7-first touch of breasts; count 8-first touch of vagina; count 10 & count 11), and one count of forcible lewd act on a child under 14 years of age (§ 288, subd. (b)(1)) (count 9-hands on penis first time). As to all the counts, the information alleged Andrade committed the offenses against multiple victims (§§ 1203.066, subd. (a)(7); 667.61, subds. (b) & (e)). With respect to counts 2, 4, 8, 9, and 11, the information alleged Andrade engaged in substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)).

Before Andrade's first trial, a different trial judge ruled inadmissible any child pornography retrieved from Andrade's computer pursuant to Evidence Code section 352. In his first trial, the jury could not reach a verdict on any of the charges, and the trial court declared a mistrial.

Before Andrade's second trial, the prosecutor moved to admit evidence of child pornography retrieved from Andrade's computer pursuant to Evidence Code section 1101, subdivision (b). Andrade filed a motion in limine.

At an Evidence Code section 402 hearing, the prosecutor offered the testimony of Mark Eskridge, a computer forensic investigator with the Orange County District Attorney's office. Eskridge testified he conducted a forensic examination of Andrade's computer. Eskridge explained how he retrieved images from Andrade's computer and the subject of those images. Eskridge stated he found 52 images of child pornography in unallocated space, nine images of child pornography in allocated space, and 40 images of child pornography in the thumbnail gallery cache. Eskridge explained the computer had four users, three females, including S.A., M.A., and Andrade's ex-wife, and one male, Andrade. Eskridge said the computer included a folder titled, "Miguel's Stuff." Eskridge explained that in that folder, he found the uniform resource locator (URL) related to teenagers, including "'Exploited Teen'" and "'Brazilian Teen.'" Eskridge testified he did not find any search terms in the Web browser indicating

a user searched for child pornography. He admitted that with respect to unallocated images, there was no history whether or when they were viewed. He could only say that images in unallocated space existed on the hard drive but were erased. He agreed it was possible to download a multi-page document, view only the first page or two, save the document, and later open the document only to discover there is a page six or seven.

The trial court's tentative ruling was to allow Eskridge to testify he found 52 images of child pornography in unallocated space and admit into evidence 10 of those images. The court reasoned that pursuant to Evidence Code section 352 anything more would be cumulative and unduly prejudicial. The prosecutor argued the evidence was admissible pursuant to Evidence Code section 1101, subdivision (b), to establish intent and motive and Evidence Code section 1108.

Defense counsel argued the evidence was not admissible pursuant to Evidence Code section 1108 because the evidence was not evidence of another sexual offense (§ 311.1, subd. (a)). He added that the evidence was not admissible pursuant to Evidence Code section 1101, subdivision (a), because it was not relevant to intent and motive, and it was unduly prejudicial pursuant to Evidence Code section 352. The prosecutor responded the evidence was relevant pursuant Evidence Code section 1101, subdivision (b), to establish intent and motive because Andrade's possession of child pornography tended to prove he had a sexual interest in underage girls.

The trial court ruled inadmissible the nine images of child pornography in allocated space, and 40 images of child pornography in the thumbnail gallery cache. With respect to the 52 images of child pornography in unallocated space, the court stated, "[I]ntent really is an issue in this case, because you're dealing with a biological father. A jury is going to be wondering being civilian and not being as knowledgeable as we are, would a father actually be sexually attracted to his [young] daughter[s]? . . . It's hard for a juror to understand that. And the [prosecutor] ha[s] a right to prove what the intent was or what the motive was." The court reasoned that the volume of images of child

pornography in unallocated space weighed against the conclusion third parties downloaded the images or it was inadvertent. The court felt the expert's discussion of unallocated computer space was not likely to confuse jurors because they were likely familiar with deleting items from and cleaning a hard drive.

The court opined that the evidence of child pornography was potentially prejudicial but the evidence was very probative. The court reviewed the 52 images of child pornography and selected 10 photographs to admit into evidence. The court excluded photographs of sexual acts or any photographs depicting young girls and young boys. The court stated, "I have spent some time and I've come up with 10 clearly prepubescent photographs, where there are provocative poses, whether nude or not nude, but there are no sex acts or any of the other things." The court concluded that it would allow Eskridge "to say something along this line: I recovered 52 images of young females. I have here 10 samples." The court did not reach the issue of whether the evidence was admissible pursuant to Evidence Code section 1108.

At trial, the prosecutor offered Eskridge's testimony. Eskridge testified he examined Andrade's computer and in unallocated space he found 52 images from 2005 to 2007 of underage subjects who were either nude or partially nude. He explained he found the images in the unallocated space, which meant the images had been deleted from the allocated space where all other operating filed remain visible. On cross-examination, Eskridge claimed that in performing forensic adult pornography viewing he had never encountered child pornography. He admitted though he was familiar with the concept of "'porn storm,'" where a person views a pornographic Web site, and numerous other Web browsers will pop up. The photographs were not displayed in court or published to the jury. The photographs were placed in a manila envelope and made available to the jury during deliberations.

Andrade offered his ex-wife's testimony. She testified her daughters, S.A. and M.A. were angry at their father, Andrade. She explained that in 2007 when

S.A. told her that Andrade had touched her inappropriately, she threatened to call the police but S.A. said Andrade had only touched her arm. She did not believe Andrade had impure thoughts about his daughters.

Andrade offered the testimony of Jeff Fischback, a computer forensic examiner. Fischback testified a computer user may go to a Web page for pornography that contains different types of pornography, adult pornography and child pornography. He explained that both types of pornography could be downloaded at the same time even though the user is only viewing the adult pornography.

Andrade testified on his own behalf. He categorically denied touching S.A. or M.A. inappropriately. Andrade explained that after his ex-wife moved out, S.A. and M.A. were angry and their anger was directed at him. He claimed they often were angry at him because he forbade them from going out and he made them do their homework. He admitted possessing pornographic materials and was embarrassed his daughters found the materials.

When discussing the jury instructions, the trial court noted the prosecutor had submitted to the court for its review *People v. Ward* (1986) 188 Cal.App.3d 459 (*Ward*), on the issue of whether section 288, subdivision (a) (lewd act on a child under 14 years of age) is a lesser included offense of section 288, subdivision (b) (forcible lewd act on a child under 14 years of age). The prosecutor indicated he believed it is a lesser included offense. After hearing brief argument, the court stated it would take the matter under submission. At the next court hearing, the trial court explained it recognized *Ward, supra,* 188 Cal.App.3d 459, held section 288, subdivision (a), is a lesser included offense of section 288, subdivision (b), although "in a slightly different factual context than ours." After the prosecutor repeated he thought it was a lesser included offense, the court recognized *Ward* was still good law. The court noted though "[i]t has exactly the same penalty[,]" though forcible lewd act can trigger full consecutive sentencing, probation ineligibility, and other adverse consequences that a conviction for a nonforcible lewd act

cannot trigger. Reasoning that because no relevant recent secondary legal authority considered it a lesser included offense, the court characterized *Ward* as "ancient" and concluded it "should [not] go out on a limb and follow the 24-year-old case." The court refused to instruct the jury that section 288, subdivision (a) (lewd act on a child under 14 years of age) is a lesser included offense of section 288, subdivision (b) (forcible lewd act on a child under 14 years of age).

The jury convicted Andrade of all counts and found true all the allegations. After denying Andrade's new trial motion, the trial court sentenced Andrade to prison for a total term of 48 years to life.

DISCUSSION

I. Lesser Included Offense Instruction

Andrade argues the trial court erred in not instructing the jury on the lesser included offense of lewd act on a child as to counts 3, 4, and 9. Not so.

Two tests are used to determine whether an offense is a lesser included offense: the statutory elements test and the accusatory pleading test. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) The statutory elements test is satisfied when """all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense."""" (*Ibid*.) The accusatory pleading test is met """if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed."""" (*Id*. at pp. 288-289.)

Section 288 prohibits lewd and lascivious acts with a child under 14 years of age. Section 288, subdivision (a), is a lesser or necessarily included offense of forcible lewd conduct prohibited by subdivision (b). (*Ward, supra,* 188 Cal.App.3d at p. 472; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321-1322.) The only difference between the crimes of forcible and nonforcible lewd conduct is that forcible lewd conduct

requires a finding of the use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (§ 288, subds. (a) & (b)(1).)

Even though a section 288, subdivision (a), offense is a lesser included offense of a section 288, subdivision (b), offense, the trial court is not necessarily required to instruct on the lesser offense. "A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] 'there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*. [Citations.]" (*People v. Memro* (1995) 11 Cal.4th 786, 871 (*Memro*).)

As our Supreme Court stated in *People v. Hughes* (2002) 27 Cal.4th 287, 365: "[I]nstructing on lesser included offenses shown by the evidence avoids forcing the jury into an 'unwarranted all-or-nothing choice' [citation] 'that could lead to an improper conviction.' [Citations.]" The instruction need not be given if there is no evidence that the offense was less than the offense charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the lesser offense, but not the greater, was committed. [Citations.]" (*Id*. at p. 162.) We apply a de novo standard of review to the trial court's failure to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

Based on the entire record before us, we conclude there is no evidence counts 3, 4, and 9, all forcible lewd acts on a child under 14 years of age, were less than the offense charged. Preliminarily, we note that at trial Andrade denied he ever touched S.A. or M.A. This is not a situation where Andrade admitted touching his daughters but claimed the touchings were innocuous or accidental.

With respect to count 9, the evidence demonstrated that on one of the occasions that Andrade touched S.A., Andrade asked S.A. to touch his penis. To accomplish his desired goal, Andrade forced S.A. to stroke his penis until he ejaculated. After Andrade told S.A. that her stroking his penis "was part of being a family[,]" Andrade grabbed her hand and put her hand on his penis. Andrade moved S.A.'s hand up and down on his penis until "[w]hite liquid came out of his penis." Andrade's claim he "was never overly forceful" is simply ludicrous. Based on this evidence, there was certainly no evidence this was anything other than a forcible lewd act on a child under 14 years of age. (*Memro, supra,* 11 Cal.4th at p. 871.)

As relevant here to count 3, M.A. was in the living room sitting on the couch watching television when Andrade touched her breasts under her shirt but on top of her bra. M.A. cried and asked Andrade to stop. Andrade told M.A. that "'families should love each other'" and "'we shouldn't be ashamed of our bodies.'" M.A. tried to get away, but Andrade grabbed her wrist "really hard" and pulled her back to the couch. With respect to count 4, M.A. was asleep in her bed when Andrade rubbed her vagina under her pajama bottoms but over her underwear. M.A. cried and asked Andrade to stop. Andrade asked M.A. to touch his penis. Andrade grabbed her arm and when M.A. pulled away from him, Andrade said, "'it makes me happy and you shouldn't be afraid to love your own, your family.'" Based on M.A.'s testimony that during counts 3 and 4 Andrade grabbed her and prevented her from leaving was certainly sufficient evidence he used force in committing the acts.

Furthermore, even if there was error in not instructing the jury on nonforcible lewd conduct as to counts 3, 4, and 6, such error was harmless. We employ the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, as this was not a capital case and Andrade was not deprived of his right to present a defense. It is not reasonably probable the jury would have convicted Andrade of the lesser offense of nonforcible lewd conduct. (*Breverman, supra,* 19 Cal.4th at pp. 154-155.) As we

explain above, the overwhelming evidence at trial established Andrade committed forcible lewd acts on a child under 14 years of age on counts 3, 4, or 9, or nothing at all. There was simply no evidence he committed anything other than forcible lewd conduct as to counts 3, 4, or 9.

Thus, the trial court was not obligated to instruct the jury on the lesser offense of nonforcible lewd act on a child under 14 as to counts 3, 4, and 9. Andrade's federal and state constitutional rights were not implicated by the court's refusal to instruct the jury section 288, subdivision (a) (lewd act on a child under 14 years of age) is a lesser included offense of section 288, subdivision (b) (forcible lewd act on a child under 14 years of age).

II. Admission of Child Pornography Evidence

Andrade contends the trial court erred in admitting evidence of child pornography because there was an insufficient foundation he possessed the images and the evidence was not admissible pursuant to Evidence Code section 1101, subdivision (b). Neither contention has merit.

A. Foundation

Andrade asserts the 52 images of child pornography "was too speculative to be admitted because there was no legally sufficient foundation establishing that [he] possessed this child pornography." We disagree.

"When, as here, the relevance of evidence depends on the existence of a preliminary fact, the proffered evidence is inadmissible unless the trial court finds there is sufficient evidence to sustain a finding of the existence of the preliminary fact. (Evid. Code, § 403, subd. (a)(1).) That is, the trial court must determine whether the evidence is sufficient for a trier of fact to reasonably find the existence of the preliminary fact by a preponderance of the evidence. [Citation.] 'The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury."' [Citation.] A trial court's decision as to whether

the foundational evidence is sufficient is reviewed for abuse of discretion. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1120.)

Here, the preliminary fact required to establish the foundation for the admission of the 52 images of child pornography in unallocated space and to render them relevant is the connection between Andrade and the images. Eskridge's testimony provided the trial court with sufficient evidence to reasonably find the existence of that preliminary fact by a preponderance of the evidence, i.e., a fact which it is more likely than not that the fact is true. After explaining the differences between allocated space, unallocated space, and the thumbnail cache database, Eskridge testified his forensic examination revealed the computer had four users: Andrade, his ex-wife, and two minor daughters. Eskridge explained he found 52 images of child pornography in unallocated space and explained unallocated computer space is an area where once active files were located after the files had been deleted. This testimony was sufficient to demonstrate by a preponderance of the evidence Andrade possessed the 52 images of child pornography in unallocated space found on his computer.

Andrade focuses on Eskridge's testimony Andrade could not access the images in unallocated space and Andrade could have inadvertently downloaded the images and not viewed them, to support his claim the preliminary fact was not proved by a preponderance of the evidence. Andrade misunderstands the evidentiary standard. It is true there was testimony that Andrade could not, without special software, access the images in unallocated space. It is also true he could have inadvertently downloaded the images and not viewed them. But Eskridge testified the 52 images in unallocated space had been deleted and in viewing adult pornography while performing forensic examinations of computers he had never inadvertently viewed child pornography. We conclude the trial court did not abuse its discretion when it concluded the volume of images weighed against the conclusion the images were downloaded inadvertently.

Finally, Andrade relies on *Tecklenburg v. Appellate Division* (2009) 169 Cal.App.4th 1402, to argue there was no corroborating evidence to establish Andrade possessed the images. In *Tecklenburg*, the court addressed the issue of whether there was sufficient evidence to support defendant's convictions for possession or control of child pornography. (*Id*. at pp. 1412-1414.) Here, the issue is whether the trial court abused its discretion in concluding the prosecutor established by a preponderance of the evidence the preliminary fact—a connection between Andrade and the child pornography found in unallocated space on his computer. There was.

B. Evidence Code section 1101, subdivision (b)

Andrade argues the trial court erred in admitting the child pornography evidence because it was not relevant on the issues of intent and motive and Evidence Code section 352 forbid its admission. He also claims admission of the evidence violated his federal and state constitutional rights to due process and a fair trial. None of his contentions have merit.

Evidence of uncharged acts is generally inadmissible to prove criminal disposition. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) However, Evidence Code section 1101, subdivision (b), allows the trial court to admit "evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, . . . intent, . . .) other than his or her disposition to commit such an act."

"'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.) Other acts evidence is relevant where the other acts and the charged offense are sufficiently similar. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402 (*Ewoldt*).)

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent [and knowledge]. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 402.)

"Evidence that a defendant committed other crimes may be admitted when relevant to establish a motive for the commission of the charged offense . . . [citations], but only if the offenses share common features [citation]." (*People v. McDermott* (2002) 28 Cal.4th 946, 999.) We review a trial court's rulings on relevance and prejudice for an abuse of discretion. (*Memro, supra,* 11 Cal.4th at p. 864.)

Memro, supra, 11 Cal.4th 786, is instructive here. In that case, defendant was charged with the first-degree murder of a seven-year-old boy. Defendant told the police he had "tried to engage in anal intercourse with [the victim's] dead body." (*Id.* at p. 813.) The prosecutor relied on a felony-murder theory of guilt: the killing allegedly had occurred during the commission or attempted commission of a lewd act on a child in violation of section 288. Pursuant to Evidence Code section 1101, subdivision (b), the trial court admitted magazines and photographs depicting clothed and unclothed males ranging in age from prepubescent to young adult. Some of the photographs were sexually explicit. The California Supreme Court upheld the trial court's ruling: "The court did not abuse its discretion by ruling the magazines admissible under Evidence Code section 1101, subdivision (b), to show intent. We believe the photographs were admissible to show defendant's intent to molest a young boy in violation of section 288. [¶] . . . [T]he photographs, presented in the context of defendant's possession of them,

yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. [Citation.] The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with [the victim]." (*Memro, supra,* 11 Cal.4th at pp. 864-865.)

Pursuant to *Memro*, Eskridge's testimony he found 52 images of child pornography in unallocated space and the 10 images of child pornography from unallocated space were properly admitted to show Andrade "had a sexual attraction to young [girls] and intended to act on that attraction." (*Memro, supra,* 11 Cal.4th at p. 865.) The evidence was "admissible as probative of [Andrade's] intent to do a lewd or lascivious act with [his daughters]." (*Ibid.*)

Andrade argues his intent was not an issue because the only issue was whether the acts occurred and the fact he had adult pornography on his computer demonstrated he had "an interest in sex, period." As to his first claim, "[Andrade's] intent to violate section 288 was put at issue when he pleaded not guilty to the crimes charged. [Citations.]" (*Memro, supra,* 11 Cal.4th at p. 864.) With respect to his second claim, Andrade's interest in sex, or adult pornography, did not diminish the probative value of the 52 images to demonstrate he also had a sexual interest in young girls. Thus, the trial court properly concluded the 52 images of child pornography was admissible pursuant to Evidence Code section 1101, subdivision (b). That does not end our inquiry however. We must determine whether Evidence Code section 352 required their exclusion. We conclude it did not.

Although other acts evidence might be relevant to prove a material fact other than a defendant's criminal disposition, this evidence is subject to exclusion pursuant to Evidence Code section 352. (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Evidence Code section 352 authorizes the trial court to "exclude *evidence* if its probative value is substantially outweighed by the probability" its admission will create a substantial danger of undue prejudice. For purposes of Evidence Code section 352,

"prejudice" means "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]'" (*People v. Heard* (2003) 31 Cal.4th 946, 976.)

Andrade argues the 10 photographs were especially prejudicial because they "depicted minors involved in graphic sexually provocative poses[]" and the jury would "'view [him] as a kind of freak, a pariah, a "pervert."'"[2] The *Memro* court's response to a similar argument applies here: "We find no abuse of discretion in admitting the magazines or the photographs. To be sure, some of this material showed young boys in sexually graphic poses. It would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent to violate section 288 was substantial. The court balanced the items' evidentiary worth against their potential to cause prejudice and determined that the former substantially outweighed the latter. Its decision was reasonable." (*Memro, supra,* 11 Cal.4th at p. 865.) Moreover, the trial court's decision to admit the child pornography was reasonable because the child pornography was less inflammatory than Andrade's daughter's testimony concerning the charged offenses. (See *Ewoldt, supra,* 7 Cal.4th at p. 405 [potential for prejudice decreased because "[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses"].)

Andrade also claims the child pornography evidence would mislead and confuse the jury. Not so. It is possible the risk of juror confusion may increase when uncharged offenses are introduced as evidence. "If the prior offense did not result in a conviction, that fact increases the danger that the jury may wish to punish the defendant for the uncharged offenses and increases the likelihood of confusing the issues 'because the jury [has] to determine whether the uncharged offenses [in fact] occurred.'

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[2] We have reviewed the 10 photographs the trial court admitted into evidence. The photographs show young girls, nude and semi-nude in provocative poses.

[Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 284 (*Branch*).) "This risk, however, is counterbalanced by instructions on reasonable doubt, the necessity of proof as to each of the elements of a lewd act with a minor, and specifically that the jury 'must not convict the defendant of any crime with which he is not charged.'" (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42 (*Frazier*).) The prior uncharged offense evidence concerned photographs of unnamed girls. Andrade was not charged with possessing child pornography. Additionally, any remaining risk of confusion was sufficiently countered by the trial court's instructions. The trial court instructed the jury on the elements of the charged offenses, reasonable doubt, and the proper use of evidence of prior uncharged offense evidence. There is nothing in the record to indicate the jury was confused by the photographs. (*Branch, supra,* 91 Cal.App.4th at p. 284.)

Andrade also contends the child pornography evidence would consume an undue amount of time. Again, we disagree. "Conceivably a case could arise in which the time consumed trying the uncharged offenses so dwarfed the trial on the current charge as to unfairly prejudice the defendant . . . and we cannot say spending less than a third of the total trial time on these issues was prejudicial as a matter of law." (*Frazier, supra,* 89 Cal.App.4th at p. 42 [uncharged offense evidence that comprised 27 percent of the total trial transcript did not consume an unreasonable amount of time].) Here, the expert witnesses' testimony comprised less than 25 percent of the total trial transcript from the second trial. And the evidence required only two additional jury instructions. Thus, we cannot conclude the uncharged offense evidence consumed an undue amount of time.

Andrade relies on *Ewoldt, supra,* 7 Cal.4th 380, and *People v. Balcom* (1994) 7 Cal.4th 414 (*Balcom*), to argue that intent was not at issue. (*Ewoldt, supra,* 7 Cal.4th at p. 406 ["If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed"]; *Balcom, supra,* 7 Cal.4th at pp. 422-423 ["because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would

be merely cumulative on this issue"].) Andrade claims that because he denied the charges, if the jury resolved the credibility contest against him and concluded he committed the acts, they necessarily would also conclude he possessed the requisite intent. (*Ewoldt, supra,* 7 Cal.4th at p. 406 ["If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed"]; *Balcom, supra,* 7 Cal.4th at pp. 422-423 ["because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue"].) *Ewoldt* and *Balcom* are inapposite.

As we explain above, evidence Andrade possessed child pornography was relevant to the issue of his intent to commit lewd acts on his underage daughters. The evidence was relevant to demonstrate Andrade's intent, i.e., he possessed child pornography because he was sexually interested in underage girls. This evidence assisted the jury in assessing whether Andrade touched his daughters with the intent to arouse, appeal to, or gratify his lust, passion, or sexual desires. We disagree that if the jury concluded he committed the acts he necessarily possessed the requisite intent.

Andrade's reliance on *People v. Earle* (2009) 172 Cal.App.4th 372, (*Earle*), is also misplaced. In *Earle,* the court considered the issue of severing an indecent exposure case with an assault case. (*Id*. at p. 385.) The majority opinion stated Evidence Code section 1108 would certainly permit admission of uncharged offense evidence of an indecent exposure in a prosecution for indecent exposure. (*Id*. at p. 397.) The court explained, "However, the statute cannot infuse an uncharged offense with relevance or probative value it cannot rationally be found to possess." (*Ibid*.) The court concluded, "But a propensity to commit one kind of sex act cannot be supposed, without further evidentiary foundation, to demonstrate a propensity to commit a *different act*." (*Id*. at p. 399.) Unlike *Earle,* this case concerned the application of Evidence Code sections 1101, subdivision (b), and 352, and not a motion to sever. And as we explain

above, evidence Andrade possessed child pornography is relevant on the issue of intent in a case where he is charged with committing lewd acts on his underage daughters.

Finally, Andrade claims admission of the child pornography evidence violated his federal and state constitutional rights. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.'" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Here, admission of the prior uncharged offense evidence was relevant to Andrade's intent and motive and its admission did not implicate Evidence Code section 352. Thus, Andrade's claim his constitutional rights were violated is meritless.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.